Supreme Court, U.S.
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No. 01-819

In the

Supreme Court of the United States

JOE C. ROWE and wife, SHARON B. ROWE, and HOWARD L. PRUITT, JR. and wife, GEORGIA PRUITT,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in awarding just compensation for the taking of a partial tract of property, the Fifth Amendment allows a court to reduce the award by the value of the *general* benefits said to accrue to the remainder of the tract as a result of the taking.

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners Joe C. Rowe, Sharon B. Rowe, Howard L. Pruitt, Jr., and Georgia Pruitt respectfully file this reply to respondent's Brief in Opposition (Opp.).

ARGUMENT

The petition showed how, in giving an affirmative answer to the question presented, the North Carolina Supreme Court issued a demonstrably erroneous ruling in conflict with numerous state and federal courts, including this Court. Respondent argues that the Court lacks jurisdiction to resolve the conflict and that there is in any event no compelling reason to grant the petition. As set forth below, respondent errs on both counts.

I

THIS COURT UNQUESTIONABLY HAS JURISDICTION

Respondent asserts first that this Court lacks jurisdiction because the question presented "was neither considered nor decided by" the North Carolina Supreme Court. Opp. at 9. This assertion is completely and unequivocally false, and this Court unquestionably has jurisdiction under 28 U.S.C. § 1257(a).

The state supreme court decided two issues, conveniently addressed in Part I and Part II of its opinion, respectively. The first involved the North Carolina analogue to the federal Due Process Clause: "We first conclude that the Court of Appeals erred because the question of whether [North Carolina General Statutes § 136-112(1)] violates the Law of the Land Clause was not properly presented." Petition Appendix (Pet. App.) at A–3 (discussing North Carolina Rule of Appellate Procedure 10(c) and other state-law authorities). *Petitioners do not challenge any aspect of that ruling.*

The second issue decided by the state's highest court involved state *and federal* equal protection guarantees: "We also agree with Judge Horton that [Section] 136-112(1) did not deprive defendants the equal protection of the law . . . ." *Id.* at A–4. Accordingly, "we reverse the Court of Appeals' holding that [the statute] violates the Equal Protection Clause of the North Carolina Constitution. We also hold that it comports with the United States Constitution." *Id.*

How did the state supreme court arrive at this rejection of petitioners' federal constitutional claim? At the risk of being pedantic, but impelled by respondent's jurisdictional argument, we recount the court's reasoning in detail:

1. "In concluding that defendants were denied equal protection under [Section] 136-112(1), the Court of Appeals applied strict scrutiny. We conclude that it was error to do so. In fact, as explained below, [the statute] does not trigger strict scrutiny because it neither classifies on the basis of a suspect classification nor infringes upon a fundamental right." Pet. App. at A–5 (citation omitted).

2. "[Petitioners] argue that the Court of Appeals correctly concluded that [Section] 136-112(1) infringes upon a fundamental right. They claim that the statute violates their right to just compensation." *Id.* at A–6.

3. "Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution. It is specifically enumerated in the Fifth Amendment to the United States Constitution and has been applied to the states through the 14th." *Id.* (citing *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 239 (1897)).

4. "Since a fundamental right is involved, we must determine [whether] that right is infringed upon by application of [Section] 136-112(1). If [petitioners'] right to just compensation is impacted by the statute, then that impact would warrant

a review under the strict-scrutiny standard. If there is no infringement, then the rational-basis standard would apply." *Id.* at A–7.

5. "The Court of Appeals held that [petitioners] did not receive just compensation because the statute allows the jury to consider 'general benefits' when it calculates just compensation for a partial taking. *Id.* In other words, "[b]ecause this statute allows a jury to consider 'general benefits,' the Court of Appeals held that it 'allows a compensation which is unjust to the condemnee.'" *Id.* at A–8 (quoting Pet. App. at B–18).

6. "We disagree. The Fifth Amendment to the United States Constitution clearly allows Congress to empower the fact-finder to consider 'general benefits.' *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 366 . . . (1918)." *Id.* The states share this power with Congress: "It is clear that the Fourteenth Amendment to the United States Constitution allows states to empower fact-finders to consider 'general benefits' when calculating just compensation. The United States Supreme Court stated in *McCoy v. Union Elevated R.R. Co.* that . . . ." *Id.*[1]

What does this recounting demonstrate? It demonstrates that petitioners advanced a *federal constitutional* claim, in support of which they made a *federal constitutional* argument, and that the Supreme Court of North Carolina rejected that claim, issuing a *federal constitutional* ruling grounded in the *federal constitutional* decisions of this Court. And precisely what was

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[1] Once the lower court concluded that Section 136-112(1) satisfied the requirements of the Just Compensation Clause as applied to the states (and, as no one disputed, that the statute employed no suspect classification), the court applied "rational-basis scrutiny." Pet. App. at A–12. Like virtually all statutes, Section 136-112(1) passed that test handily. *See id.* at A–12 to –14. If this Court grants the petition and reverses, the state supreme court will, by its own admission, be compelled to apply strict scrutiny instead. *See id.* at A–7. Under any view of the law, that change is potentially dispositive.

that ruling? It was that the Just Compensation Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, "allows states to empower fact-finders to consider 'general benefits' when calculating just compensation." *Id.* Rephrased as a question and revamped slightly for clarity, this interpretation of the Just Compensation Clause is precisely what petitioners have presented to this Court for decision.[2]

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[2] Although the discussion in the text more than suffices to establish this Court's jurisdiction to entertain the petition, petitioners note for good measure that the jurisdictional decisions cited by respondent, *see* Opp. at 10, are obviously inapposite. For example, in *Mellon v. O'Neil*, 275 U.S. 212, 214 (1927), the only assignment of error that conceivably conferred jurisdiction on this Court was that "provisions of the New York Civil Practice Act, relating to the amendment of process and substitution of parties, . . . are invalid because of repugnancy to the laws of the United States." The Court, however, dismissed the appeal for want of jurisdiction, because the record did "not show that this question was either presented to or passed upon by the Appellate Division. *No reference to the Practice Act or challenge to its validity appears in the proceedings either at Trial Term or in the Appellate Division.*" *Id.* (emphasis added). In the opinion below, by contrast, there are numerous references to the challenged state statute—namely, Section 136-112(1)—and to its validity vel non on federal constitutional grounds.

For another example, in *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934), a taxpayer challenged a state tax determination in the New York courts on both federal and state constitutional grounds. In awarding him relief, the intermediate appellate court, "while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States"; the state's highest court affirmed, "but without opinion, and the grounds of its decision are left to conjecture." *Id.* at 54 (citation omitted). In dismissing the writ of certiorari as improvidently granted because it could not be determined whether the decision below rested on federal grounds, this Court explained that

(continued...)

Therefore, respondent simply is flat-out wrong to assert that the question presented "was neither considered nor decided by" the state supreme court. Opp. at 9. To the contrary, "the validity of a statute of [North Carolina was] drawn in question on the ground of its being repugnant to the Constitution . . . of the United States," 28 U.S.C. § 1257(a), and the court below sustained the statute on the ground that, in awarding just compensation for the taking of a partial tract of property, the Fifth Amendment allows a court to reduce the award by the value of the *general* benefits said to accrue to the remainder of the tract as a result of the taking. The Court unquestionably has jurisdiction to review that interpretation of the federal Constitution.

II

THE QUESTION PRESENTED CLEARLY MEETS THE STANDARDS OF RULE 10

Following its meritless jurisdictional argument, respondent attempts to show that there is no "compelling reason" why the petition should be granted. Opp. at 13. As set forth below, that attempt is not well taken.[3]

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[2] (...continued)
"jurisdiction cannot be founded upon surmise. Nor can [a] claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record." *Id.* Here, there is no surmise about the basis for the decision below. The Supreme Court of North Carolina explicitly invoked the United States Constitution and explicitly ruled that it permitted the state to do just what petitioners argued was prohibited by that same Constitution.

[3] As an initial matter, we can dismiss respondent's reliance on the oft-cited dictum of Justice Brandeis that "[c]onsiderations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to (continued...)

A. Respondent Offers No Credible Reason for Discounting or Ignoring the Acknowledged Split in the Lower Courts

The petition carefully demonstrated that "the decision of the Supreme Court of North Carolina conflicts with numerous decisions of state and federal appellate courts." Pet. at 4. What does respondent have to say in opposition? In a word, nothing. In fact, *respondent agrees with petitioners*, candidly conceding the existence of a "long standing difference among the states and the federal courts on the question of allowing consideration of general benefits in calculating just compensation." Opp. at 14. In other words, by respondent's own admission, "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Rule 10(b).

Besides acknowledging its existence, what *does* respondent say about this conflict? Putting aside for a moment the correctness of the decision below, respondent makes basically two arguments. First, that the acknowledged conflict is not sufficiently "recurring" to warrant resolution at this time, Opp. at 14; i.e., the conflict is "academic" or "episodic," Opp. at 13. The principal support for this point is, incredibly, petitioners' own statements. But in declaring that "[p]etitioners admit that 'the rules about which benefits may be set off against the value

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[3] (...continued)
raise it." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (concurring opinion), *cited in* Opp. at 14. First of all, the constitutional question here *is* raised by parties whose interests entitle them to raise it. More fundamentally, it is incredible to imagine that the Court exercises its certiorari jurisdiction for the purpose of *avoiding* constitutional questions. Instead, one of the storied purposes of the Court's jurisdiction, particularly in cases like this one where state courts are split on issues of federal constitutional law, is to *answer* those questions. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

of the land taken are usually of ancient vintage,' " Opp. at 14 (quoting Pet. at 10), respondent conveniently omits—and thus tellingly admits—petitioners' point that these setoff rules "are applied frequently to this day"—a synonym for *recurring* and an antonym for *episodic*. Pet. at 10 (citing, as exemplary, two decisions issued in 2001 and one the year prior). Moreover, in repeating petitioners' statement that "the 'basic theory' of just compensation has not changed for at least a century," Opp. at 14 (quoting Pet. at 16), respondent merely highlights just how sharply the decision below diverges from the long standing decisions of the federal courts and most state courts.

Respondent's second argument for this Court's ignoring the "long standing difference among the states and the federal courts on the question" presented, Opp. at 14, is the supposed "uniqueness" of petitioners' situation, Opp. at 17. But while chiding petitioners for citing only *two* cases (in addition to this one) that exemplify how the "consideration of general benefits *often* transforms the constitutional guarantee of just compensation into a rule of no compensation," respondent cites *neither a single case nor any other authority* for its bald assertion that "verdicts of zero compensation are extremely rare" in partial takings cases like this one. Opp. at 16. Respondent also asks the Court to believe that even though it is explicitly authorized by statute to do so, even though it did so in this case, and even though the North Carolina Supreme Court gave its blessing to the practice, respondent "virtually never" offers evidence of *general* benefits in partial takings cases. *Id.* But respondent's naked promise to "trust me" is not a legitimate reason to deny the petition.

B. Respondent Offers No Credible Reason to Think That the Acknowledged "Federal Rule" Against Consideration of General Benefits Is Anything Other than a Constitutional Rule

This brings us to the merits of the state supreme court's ruling. In addition to demonstrating a conflict between the de-

cision below and the decisions of numerous state courts of last resort and federal courts of appeals, petitioners demonstrated that the state supreme court had "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). Indeed, petitioners argued that the ruling below was such a "demonstrably erroneous application of federal law," *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999), as to warrant summary reversal. *See* Pet. at 11-18.

Respondent does not deny that rule adopted by the North Carolina Supreme Court in the present case conflicts with the rule adopted by this Court in *Bauman v. Ross*, 167 U.S. 548, 574 (1897). *See id.* (holding that in partial takings cases, when "the part which [the owner] retains is *specially and directly* increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened" by the increase (emphasis added)). Instead, respondent argues that no authority suggests that "the rule that was being adopted in [*Bauman*] regarding benefits (the federal rule) was intended to establish the *minimum* level of compensation that was constitutionally acceptable." Opp. at 18. Indeed, in respondent's view, several cases hold otherwise. *See* Opp. at 18-19. These arguments are mistaken.

First, what the cases actually hold is that "the Supreme Court of the United States and a majority of other jurisdictions have held that only special benefits may be *constitutionally* set-off." 3 Julius L. Sackman et al., *Nichols on Eminent Domain* § 8A.02[6] (rev. 3d ed. 2001) (footnote omitted and emphasis added). Prior to *Bauman v. Ross*, the Court held that under the Constitution, "compensation must be a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). "This excludes," added the Court, "the taking into account, as an element in the compensation, any supposed benefit that the owner may receive *in common with all* from the public uses to which his private property is appropriated," i.e., general benefits. *Id.* (emphasis

added). *Cf. Brand v. Union Elevated Railroad Co.*, 238 U.S. 586, 597 (1915) (Day, J., dissenting) (although the majority did not reach the issue, four Justices cited *Monongahela* as holding that "just compensation, *in the constitutional sense*, excludes taking into account the supposed benefits that the owner may receive in common with the public" (emphasis added)).

The federal courts of appeals have also acknowledged the constitutional basis of the rule against consideration of general benefits. In *Aaronson v. United States*, 79 F.2d 139, 140 (D.C. Cir. 1935), the court opined that the federal rule of *Bauman v. Ross* "grows out of the command of the Constitution (Amendment 5)." The court explained that in the absence of "express words" in the governing statute granting a more generous rule of compensation, an expropriated property owner is entitled to receive precisely what "the Constitution requires"—no more and (of course) no less. *Id.* And what is that? It is precisely what is laid out in *Bauman*, namely, "consideration of damages on the one hand and [special] benefits on the other." *Id.*; *see also id.* ("The court below rightly told the jury that only special benefits should be considered . . . ."). More recent decisions are in accord with this understanding. *See, e.g., Van Buren v. United States*, 697 F.2d 1058, 1062 (Fed. Cir. 1983) (opining that "only benefits inuring specifically to the condemnee, rather than to the community at large, are relevant to an analysis of the government's liability under the Fifth Amendment"); *Caponi v. Carlson*, 392 N.W.2d 591, 596 (Minn. Ct. App. 1986) (applying the rule against consideration of general benefits in a case where the government "took Caponi's property without compensation in violation of U.S. Const. amend. V").

Second, respondent asserts that *McCoy v. Union Elevated Railroad Co.*, 247 U.S. 354, 366 (1918), espouses a contrary rule. Petitioners have already explained at length why that is not so. *See* Pet. at 12-13. As respondent acknowledges, "no property had been taken" in that case, Opp. at 20, so there was no occasion to apply a rule governing compensation for partial

takings of property. The other two cases cited by respondent, *see* Opp. at 19, are likewise distinguishable. Both *McRea v. Marion County*, 133 So. 278, 279 (Ala. 1931), and *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.*, 941 P.2d 809, 822 (Cal. 1997), involved the issue of "damages" for property *not* taken, a situation that has no application to the present case. Both relied on *McCoy* only in that confined context.

In the end, all respondent has to offer on the merits is a strained, out-of-context reading of a single sentence in a single decision of this Court. Arrayed against this meager offering are the uniform decisions of both this Court and the federal courts of appeals, together with the decisions of the vast majority of state courts. In these circumstances, it can fairly be said that the North Carolina Supreme Court applied the Just Compensation Clause in a demonstrably erroneous fashion. Whether the appropriate response by this Court is summary reversal or plenary review, it is clear that a grant of certiorari is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: January, 2002.

Respectfully submitted,

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